Tax Bulletin

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Dear Readers:

The purpose of this **Tax Bulletin** is to inform our clients and interested parties on the main issues discussed and decided in the Judicial, Legislative, and Executive Branches.

In this 69th edition, we will address 8 different issues concerning Case Laws, Legislation, and Response to Inquiries.

To access each text directly, click on:

CASE LAWS

Legislation and Response to Inquiries

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Souza, Schneider, Pugliese e Sztokfisz Advogados law firm is available to its clients should they have any questions on the decisions commented on in this newsletter.

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CASE LAWS

STF – General Repercussion recognition

• Imposition of ex-officio fine – rejection of refund or offsetting request before the National Treasury

On May 30, 2014, the Federal Supreme Court (STF), unanimously recognized the existence of the General Repercussion in the discussion contained in Extraordinary Appeal no. 796.939/SC, which deals with the constitutionality of the imposition of an ex-officio fine for the rejection of refund or offsetting request before the National Treasury. The appeal was filed by the Federal Government against an appellate decision of the Federal Regional Court of the 4th Region (TRF4), ruling that in cases in which there is no evidence that the taxpayer has acted in bad faith, the separate fines provided for in paragraphs 15 and 17 of article 74 of Law 9,430/96, clash with the provision in article 5, item XXXIV, letter a of the Federal Constitution – which, in sum, ensure to all the right to plead before Public Authorities for the defense of their rights. In this regard, the appealed appellate decision stated that the imposition of such fines tends to prevent taxpayers from seeking the refund of unduly collected amounts with the Tax Authorities, which also violates the principle of proportionality.

TRF1 – imported goods confiscation fine – exceptional measure – lack of good faith and damage to the public treasury

On May 13, 2014, the Seventh Panel of the Federal Regional Court of the 1st Region (TRF1), in the trial of Appeal for Required Review no. 0016811-49.2009.4.01.3300, unanimously, found that the confiscation fine for goods is an exceptional measure, and only applies when it has been verified, in the concrete case, that the taxpayer has willfully intended to harm the Tax Authorities or swindle them in import operations, therefore the rules governing the matter are to be interpreted systemically, taking into consideration the principles of reasonableness, proportionality, and of good faith.

In the case at bar, the taxpayer, when informed that the requirements of the special customs regime - REPETRO were not met (a situation which prevented the unloading of good in Rio de Janeiro/RJ), promptly requested the return abroad of the goods, as allowed in the legislation in force (Rule [Portaria]/MF no. 306/1995), by way of a request of rectification of the Electronic Bill of Lading.

What happens is that this request was only replied when the ship that transported the goods had already departed to its next destination (Salvador/BA), which then led to the issue of an assessment notice and an instrument for the seizure of goods, for lack of transport registration.

Associate Justice and Rapporteur, Luciano Tolentino Amaral, affirmed that there was no intention of the plaintiff to leave the goods without a registration, so much so that the plaintiff was willing to pay the taxes and fines, and promptly requested the rectification of the Electronic Bill of Lading, therefore the confiscation fine of the good was totally excessive and disproportional.

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TRF1 – customs clearance of goods – delay in the completion of tax proceeding – user loss

On May 20, 2014, the Seventh Panel of the Federal Regional Court of the 1st Region (TRF1), in the trial of Appeal for Required Review no. 0035319-05.2007.4.01.3400, unanimously found that the position of the Public Administration on the issue regarding the clearance of goods is to be provided within reasonable time, in accordance with the principles of legality and efficiency.

The Associate Justice and Rapporteur, Reynaldo Fonseca, stated that the determination of the trial court judge to proceed with the customs clearance of the goods is legitimate, since the delay to perform it is abusive and unjustified.

In this regard, the Rapporteur mentioned a precedent reported by Associate Justice Sérgio Schwaitzer, of the Federal Regional Court of the 2nd Region (TRF2), affirming that the importer has a clear and legal right to obtain, within reasonable time, a formal position of the Public Administration on the issue of the clearance of goods it has imported and which lack customs clearance, meaning the unjustified delay does not conform with the principles of legality and efficiency.

TRF1 – enforceability of prior notice for the exclusion of REFIS

On May 23, 2014, the Eight Panel of the Federal Regional Court of the 1st Region (TRF1), in the trial of Civil Appeal no. 0025142-19.2002.4.01.3800, unanimously, upheld the position for the illegality of excluding the taxpayer from the REFIS without prior notice, thus determining the taxpayer's inclusion thereto.

This position was upheld by the TRF1, despite the Superior Court of Justice (STJ) having tried Special Appeal no. 1.046.376/DF, under the repetitive appeal system and Precedent no. 355/STJ, both of which ruling that the notice of exclusion from the REFIS by the Official Gazette or the Internet is valid.

However, Associate Justice and Rapporteur Maria do Carmo Cardoso affirmed that the Special Court of the TRF1 declared the unconstitutionality of the rule that provides for the possibility of exclusion from the REFIS, regardless of prior notice of the taxpayer who joined the debt payment plan viewing that this implies a violation of the principles of due process, full defense, and adversary proceedings, which are inherent to judicial administrative proceedings.

Thus, the Rapporteur upheld the decision she had originally rendered, as she found that Special Appeal no. 1.046.376/DF and Precedent no. 355/STJ deal with the matter from a different standpoint from the one analyzed by the Special Court of the TRF1, in addition to the fact that the decision rendered by the Special Court is binding on sections subordinated to the Court, the decision submitted to review therefore prevailing.

It should be stressed that the matter in question is waiting to be heard by the Federal Supreme Court, which recognized the general repercussion of the matter in RE no. 669.196/DF, reported by Justice Dias Toffoli.

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TRF3 – IRRF – remittance of amounts for the payment of technical services without transfer of technology – prevalence of international treaties for the avoidance of double taxation

On May 8, 2014, the Federal Regional Court of the 3rd Region (TRF3) ruled the case examining the withholding taxation of the remittance of amounts for the payment of technical services without transfer of technology to companies domiciled in countries with which Brazil has entered into a treaty to avoid double taxation.

The discussion gained a new angle with the trial of Special Appeal no. 1.161.467 by the Superior Court of Justice (STJ), ruling that services rendered without the transfer of technology could only be taxed in the country of residence, mainly considering that the term "profit" contained in article 7 of the treaties should be interpreted in a broad sense, with all income earned, pursuant to instructions of the OECD itself. After the mentioned appellate decision, the Attorney General Office of the National Treasury (PGFN) issued Opinion no. 2.363/2013, recognizing the applicability of article 7, except in cases in which the treaties, within its protocols, contained provisions to include technical services into the concept of royalties. In such cases, according to the position of the Attorney General Office, income from technical services without the transfer of technology would be taxed at the source.

In the case at issue, the TRF3 analyzed three treaties - Brazil-Germany (terminated in 2005), Brazil-China, and Brazil-Argentina – granting the taxpayer's request in relation to the last two and dismissing the claim in relation to the first treaty. Although the three treaties contain provisions in its protocols equating the compensation for technical services to royalties, the Court found them to be different, without mentioning the reasons for such.

Thus, although that Court has ruled out the need to withhold as to remittances to China and to Argentina (which would be applicable to countries having treaties with similar wording), this issue does not seem to be free from any doubts, since it can be sustained that the same treatment should be applied to the three treaties, as they all have protocols with analogous provisions, equating compensation for technical services to royalties.

Legislation and Response to Inquiries

Conversion of MP no. 627/2013 – Law no. 12.973/2014 – Amendments to federal tax legislation

On May 15, 2014, Provisional Measure no. 627/2013 was converted into Law no. 12,973/2014, which brought important amendments to federal tax laws relative to Corporate Income Tax ("IRPJ"), the Income Tax of Individuals ("IRPF"), the Social Contribution on the Net Income ("CSLL"), the Contribution to the Employee Profit Sharing Plan ("PIS"), and to the Contribution to the Social Security Funding ("COFINS"), with changes to the taxation rules of profits of associate companies and subsidiaries controlled abroad, premium at the acquisition of ownership interest, etc.

Among the main changes in the law in relation to the Provisional Measure, we point out the exclusion of the provisions that introduced rules of the Federal Accounting Council (CFC) to individuals resident in Brazil, which were rejected by the National Congress.

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Response to Inquiry no. 111/14 COSIT – COFINS – concept of revenue, service provision, and cancelled sales

Response to Inquiry no. 111, issued by the General Tax Coordination ("COSIT") and was published on May 26, 2014, deals with the taxation by the Contribution to the Social Security Funding ("COFINS") on cancelled sales.

According to the COSIT, the substantiality of COFINS is the earning of revenues by legal entities, computed monthly, which do not include cancelled sales. As to the time of accounting entry, COSIT sees that due to the principle of accrual, the revenues are to be recognized and recorded in the period they refer to, irrespective of receiving or the payment for the consideration. Based on Brazilian Accounting Rule TG 30, the COSIT views that the recognition is to occur when "it is likely that the future economic benefits will flow to the entity and that such benefits may be reliably measured".

Supported by this position, the Tax Coordination clarifies that the revenue is only considered to have been earned when realized, which occurs, in the case of the service provision, "when a service is rendered with the consent of the service acquirer and a contractual commitment of the latter to pay the agreed to price, the occurrence of its effective settlement being irrelevant in this case". Thus, under the accrual basis, the taxable event of the COFINS occurred and any appeals that were not received may not be treated as cancelled sales.

On the other hand, when the service acquirer does not agree to the amount charged (entirely or partly) – whether because the services were not rendered in accordance with the contract or because the rendered services, without its consent, were not contracted, or because the amount charged lacked a contractual – the COSIT views that the service provider is not entitled to receive the payment (entirely or partly) for the rendered services. So, even if the service provider records these amounts as revenues, "they will not have this condition, since they are not considered realized revenue and consequently earned revenues", and are therefore cancelled sales.

Response to Inquiry no. 113/14 COSIT – COFINS - credit appropriation at the import of products

Response to Inquiry no. 113 was published on May 26, 2014, issued General Tax Coordination ("COSIT"), stating the position that for the calculation of Contribution to the Social Security Funding ("COFINS") credits to be appropriated from product import transactions, the 7.6 % tax rate is to be used, as established by article 8 of Law no . 10,865, dated April 30, 2004.

This was thus the final position, since although in § 21 of article 8 of Law no. 10,865, an increase of 1% of the standard COFINS rate was established for the payment of the COFINS-Import tax relative to the import of certain goods, there is no rule authorizing the credit appropriation with such tax rate increase, meaning the 7.6 % rate should prevail by force of the provisions in article 15 of said law.

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